IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 6073 of 1994

For Approval and Signature:

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MUSAMIAIMAM HYDERBAX RAZVI - Petitioner(s)
Versus
STATE OF GUJARAT - Respondent(s)

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Appearance :
MR SHALIN N MEHTA for Petitioner
MR PAURAMY SHETH, AGP for Respondents

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CORAM : HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 15/09/2006

ORAL JUDGMENT

1. This petition challenges the notification dated 6th August, 1991 of the Youth Services & Cultural Activities Department, State of Gujarat, giving

notice of its intention to declare the “Old Mosque” located at City Sheet No.17/290 of Isanpur, Taluka City, Ahmedabad (hereinafter referred to as “the property in dispute”), stated to be an ancient and historical monument, to be a protected monument, as well as the notification dated 10th December, 1993 of the Youth Services & Cultural Activities Department, declaring the property in dispute to be a protected monument under the provisions of sub-section (3) of section 4 of the Gujarat Ancient Monument & Archaeological Sites & Remains Act, 1965 (the Act).

2. The petitioner is Sajjadhansha and Sole Trustee of Shah-Alam Roza Trust. It is the case of the petitioner that land of survey No.2 of Village Isanpur, Taluka City, District Ahmedabad is vested in the said Trust under the provisions of Section 6(C) of the Gujarat Devasthan Inams Abolition Act, 1969 (hereinafter referred to as “the Inams Abolition Act”), as mentioned in the Record of Rights Entry No.172, and that, the petitioner has thereafter been shown to be the occupant of the said land and the masjid standing thereon. It is averred in the petition that, pursuant to a dispute regarding ownership and control of the aforesaid masjid, the Charity Commissioner, Ahmedabad, after holding due inquiry, had by judgement and order dated November 15, 1985, confirmed that the land of

survey No.2 of Village Isanpur is the property of the afordsaid Trust.

3. By the impugned notification dated 6th August, 1991, the Government of Gujarat, in exercise of powers conferred by sub-section (1) of Section 4 of the Act, gave notice of its intention to declare the property in dispute to be a protected monument. Pursuant to the said notification, the petitioner raised objections in writing against the same on 25th September, 1991. Thereafter, the petitioner was required to produce documentary evidence in support of the claim made by it that the masjid property is the property of the Shah-Alam Roza Trust. It appears that the petitioner produced documentary evidence and made various other submissions contending that the masjid property belongs to the petitioner Trust and has been used for Namaz everyday and, Bagi and Peer Shah Imam of the masjid are paid by the petitioner Trust.

4. It appears that, after considering the evidence produced by the petitioner, the State Government issued the impugned notification dated 10th December, 1993 under sub-section (3) of Section 4 of the Act, declaring the property in dispute to be a protected monument owned by the State Government and also saying that the same is not in religious use. Being aggrieved by the aforesaid notification, the petitioner has

invoked the jurisdiction of this Court under Article 226 of the Constitution of India.

5. Heard Mr.Shalin Mehta, learned Advocate for the petitioner and Ms.Paurami Sheth, learned Assistant Government Pleader on behalf of the respondents.

6. Mr.Mehta, learned advocate for the petitioner assailed the impugned notification mainly on three counts. Firstly, it was submitted that the State Government has no power to issue a notification under Section 4 of the Act in respect of Government property. It was submitted that, in the impugned notification dated 10th December, 1993, under the column "ownership", the name of Government of Gujarat (Revenue Department) has been shown. It was submitted that if the property in dispute was in fact of the ownership of the Government of Gujarat, there was no question of issuance of any notification under Section 4 of the Act, declaring the said monument to be a protected monument.

6.1 Secondly, it was contended that, for exercise of powers under Section 4 of the Act declaring any monument to be a protected monument, the requirements of sub-section (1) of Section 2 of the Act have to be satisfied. Referring to the definition of "ancient and historical monument",

as defined under sub-section (1) of Section 2 of the Act, it was submitted that the said provision envisages two requirements. Firstly, that the monument in question has to be of historical, archaeological or artistic interest, and secondly, it has to be in existence for not less than 100 years. It was submitted that, neither of the two conditions are fulfilled in the present case as the monument in question is neither of any historical, archaeological or artistic interest, and there is nothing on record to show that the same has been in existence for more than 100 years.

6.2 It was next contended that the impugned notification is defective as it is issued on the basis that the ownership of the property in dispute is of the Government of Gujarat, whereas the same is actually owned by the Shah-Alam Roza Trust. It was submitted that the aforesaid defect in the notification goes to the root of the matter, in that the same wrongly mentions that the property belongs to the Government, consequently, people who are not aware may not raise objections.

6.3 It was submitted that the aforesaid noting in the notification indicating that the property in dispute belongs to the Government has no legal backing and there is nothing on record to show that the property belongs to the State Government. Learned advocate for the petitioner has referred

to the Village Form No.6 (Annexure “B” to the petition) to point out that, by virtue of Entry No.172, the name of Musamia Imam Hyderbax Razvi, Vahivatkarta of Shah Alam Roza Trust has been entered as owner and occupant under the provisions of Section 6[c] of the Inams Abolition Act in respect of the property in dispute. It was argued that the Charity Commissioner had, by order dated 9th October, 1985, passed in Inquiry Case No.306/1980, declared the property in dispute to be of the ownership of the Shah-Alam Roza Trust. It was submitted that an order passed by the Charity Commissioner under the provisions of the Bombay Public Trusts Act, 1950 is a judgment in rem, and is also binding upon the State government. That, without challenging the said order before the appropriate forum, it was not open to the State Government to dispute the ownership of the Trust. It was submitted that, in the circumstances, the Government not being the owner of the property in dispute, ought not to have been shown to be the owner of the property in dispute in the impugned notification.

6.4 It was argued that, on the contrary, the masjid is being used everyday for Namaz, and that the petitioner has produced sufficient documentary evidence in support thereof, hence, the finding of the respondent State in the said notification that no religious use is made, is wholly perverse and illegal. It was accordingly submitted that the

impugned notifications are not in consonance with the provisions of the Act and do not fulfill the basic requirements of sub-section (1) of Section 2 of the Act and as such, are required to be quashed and set aside.

7. Ms.Sheth, learned Assistant Government Pleader submitted that there is no averment in the petition that the mosque is not more than one hundred years old. It was submitted that the party that asserts a point has to come out with a specific case and the onus cannot be thrown on the State Government. Referring to paragraph No.6 of the petition, it was pointed out that the petitioner had averred in the petition that the masjid property is more than one hundred years old. It was submitted that, in the circumstances, it does not lie in the mouth of the petitioner to contend that there is nothing on record to show that the masjid has been in existence for not less than one hundred years.

7.1 Dealing with the contention that the mosque was neither of any historical or archaeological interest, the learned Assistant Government Pleader referred to the original record of the Department to point out that the concerned authorities had duly recorded satisfaction that the mosque in question was of historical and archaeological interest. It was accordingly submitted that the petitioner has

not been able to substantiate its claim to the ownership of the property in dispute, and the monument in question also satisfies the requirements of sub-section (1) of section 2 of the Act and as such, there being no infirmity in the impugned notification, the petition deserves to be dismissed.

7.2 Drawing attention to the communication dated 28th June, 1993 of the District Collector, Ahmedabad addressed to the Secretary, Youth Services & Cultural Activities, (Annexure-I to the affidavit in reply), it was submitted that Entry No.172, upon which reliance has been placed by the petitioner, whereby the name of Musamia Imam Hyderbax Razvi, Trustee of Shah-Alam Roza Trust has been entered in the Revenue Records, is a promulgation entry which has not been certified and does not bear any date. It was argued that, upon perusal of the Village Form No.7/12, it can be seen that vide Mutation Entry No.944, the property in dispute has been entered under "Government Head" on 9th October, 1975 and the said entry has been certified on 13th February, 1978. In the circumstances, Mutation Entry No.944 would prevail and the ownership rights of the State Government over the property in dispute stand confirmed. It was submitted that, in the circumstances, the property in dispute has rightly been shown to be of the ownership of the State Government.

8. In the background of the aforesaid facts, it is apparent that the challenge to the impugned notification on the ground that the monument in question does not fall within the ambit of “Ancient and Historical Monument” as defined under sub-section (1) of Section 2 of the Act, cannot be sustained. The learned Assistant Government Pleader had, at the instance of the Court, produced the record of the case leading to the issuance of the impugned notification. Upon perusal of the record, it is found that the concerned authorities had, after due inquiry, recorded the satisfaction that the said monument is of historical and archaeological interest. The issue as to whether the mosque in question is of historical and/or archaeological interest is a question of fact that has to be decided by the experts in the said field. Once the concerned authorities, after due inquiry, have formed the opinion that the mosque in question is of historical and archaeological interest, in absence of any other material to the contrary, it is not the function of this Court to sit in appeal over the opinion of the expert body. In the circumstances, the submission that the mosque is neither of any historical or archaeological interest cannot be accepted.

8.1 As regards the second condition, namely, that the said Monument should have been

in existence for not less than one hundred years, considering the stand of the petitioner, as reflected in the averments made in paragraph No.6 of the petition, the petitioner cannot now be permitted to raise a dispute that the mosque has not been in existence for not less than one hundred years. When it was the very case of the petitioner that the mosque in question is more than 100 years old, there was no need for the Government to adduce any evidence in that regard in response to the averments made in the petition. In the circumstances, the twin conditions laid down under Section 2(1) of the Act having been satisfied, the contention that the property in dispute does not satisfy the requirement of “ancient and historical monument” as defined under sub-section (1) of Section 2 of the Act, must necessarily fail and the same is, accordingly, rejected.

8.2 As regards the contention that the Government property cannot be declared to be a protected monument, considering the fact that the petitioner has disputed the ownership of the Government with respect to the property in dispute, it is not necessary to decide the same at this stage.

8.3 As regards the challenge to the impugned Notifications insofar as the Government is shown to be the owner of the property in

dispute is concerned, upon considering the rival submissions and perusing the material on record, it is not possible to state one way or the other as to whether the property in dispute is of the ownership of the Shah Alam Roza Trust as claimed by the petitioner or whether the same is of the ownership of the State Government as contended on behalf of the respondents. The evidence on record is not sufficient to establish ownership of either of the parties. Strong reliance has been placed on behalf of the respondents on Mutation Entry No.944 in the Record of Rights whereby the lands have been entered under “Government Head” under the provisions of Section 8 of the Inams Abolition Act. The said position has been challenged by the petitioner on the ground that the said entry does not appear to have any basis as no order under Section 8 of the Inams Abolition Act has been produced on record, to show that the property in dispute has actually been vested in the State Government. The learned Assistant Government Pleader was granted sufficient time on several occasions to produce the order, if any, made under Section 8 of the Inams Abolition Act, on record. However, despite ample opportunities having been granted, she was not in a position to produce any such order. In absence of an order under Section 8 of the Inams Abolition Act, the claim of ownership of the property in dispute merely on the basis of the aforesaid

mutation entry cannot be accepted. However, as the Revenue Department is not a party in this proceeding, it cannot be said that there is no such order under Section 8 of the Inams Abolition Act, hence, the issue as regards ownership being a question of fact is left open, to be decided before the appropriate forum if any dispute as regards title is raised by the parties. However, the petitioner appears to be justified in challenging the impugned Notifications to the extent the same show the Government to be the owner of the property in dispute, lest in absence of any challenge to the said Notifications, it may be deemed that the petitioner has acquiesced with the same.

8.4 In the above view of the matter, it appears that the ends of justice would be served by holding that the impugned Notifications shall not be treated as proof of ownership of the Government over the property in dispute. It is, accordingly, held that in any proceeding wherein the question of ownership of the property in dispute between the petitioner and the State Government is at issue, no reliance shall be placed upon the impugned Notifications as proof of ownership by the State Government. The parties shall have to lead independent evidence and establish their rights and title over the property in dispute without reference to the impugned Notifications.

9. The petition, therefore, partly succeeds and is allowed to the aforesaid extent. Rule is made absolute accordingly. There shall be no order as to costs.

[HARSHA DEVANI, J.]

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